Petition

81-418

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD BREW and FRANCES M. BREW as Trustees of the 156 East Cafe Profit Sharing Trust,

Petitioners,

v.

FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHOADES, HORNBLOWER & CO., AND PHILIPS, APPEL & WALDEN, INC., HAMILTON/COOKE SECURITIES CORP. and JEROME ZINN,

Defendants,

PHILIPS, APPEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHOADES, HORNBLOWER & CO.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented:

1. Did the Court of Appeals abuse its discretion by refusing to allow a trustee plaintiff to file a second amended complaint in a securities fraud cause of action where the petitioners have not been guilty of bad faith and the opposing parties have not demonstrated undue prejudice?

2. Is the Order of the Court of Appeals affirming the dismissal of petitioners' amended complaint because of the alleged failure to plead sufficient particularity of securities fraud, in conflict with the principles enunciated by this Court in Foman v. Davis?

3. Whether the complaint pleading securities fraud should have been dismissed where evidentiary matter such as dates and times which were not available to the plaintiffs were not pleaded with particularity?

4. Whether plaintiffs should have been given leave to replead upon the dismissal of their complaint?

5. Whether Rule 9(b) of the Federal Rules of Civil Procedure, which requires the pleading of particularity in fraud actions be given a liberal interpretation so as to permit general allegations and allegations upon information and belief in stock fraud cases?

6. Whether Rule 9(b) of the Federal Rules of Civil Procedure, which requires the pleading of particularity in fraud actions be given a liberal interpretation so as to permit general allegations when trustees sue on behalf of trust beneficiaries.

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Opinions Below

The order and judgment of the Court of Appeals (1a)* is unreported. The orders of the District Court are unreported. The District Court order dismissing the complaint is annexed hereto at page 5a of petitioners' Appendix, and the District Court order dismissing the amended complaint is annexed hereto at page 17a of petitioners' Appendix

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1981 The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)

*Numbers in parenthesis followed by "a" refer to the pages of the Appendix annexed hereto

STATUTES AND OTHER AUTHORITIES

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Statement of the Case

On March 18, 1976, the plaintiffs-petitioners, Richard Brew and Frances M. Brew (hereinafter referred to as "Trustees") engaged Jerome Zinn, a registered representative, to manage the brokerage accounts maintained by them both individually and as trustees of an employee pension plan trust. Extensive losses have been sustained in all of the accounts by virtue of the investment decisions made solely by the registered representative Zinn, when he was acting on behalf of each of the corporate defendants-respondents. Jerome Zinn changed employment frequently between March 19, 1976 and January, 1980. As a result, it is unknown on what specific dates he was employed by and represented each of the defendants.

This action was commenced on

June 30, 1980, by the Trustees seeking recovery on various counts of monies lost by virtue of the acts of Jerome Zinn. Hamilton/Cooke Securities and Jerome Zinn were named as defendants in the original and amended complaints but, since they were never served with process, they are not parties to this proceeding.

Both the complaint and the amended complaint consist of seven counts wherein the jurisdiction of the District Court was alleged to exist under the Securities Acts of 1933 and 1934 as well as by virtue of 28 U.S.C. Sections 1331, 1332 and 1337.

Issue was joined by the defendant-respondent Philips,Appel & Walden, Inc. by the service of an answer on or about August 15, 1980. On August 27, 1980, a motion was made on behalf of the co-defendants First Wall Street Settle-

ment Corporation and Loeb,Rhoades, Hornblower & Co.,Inc ,seeking to dismiss the complaint on behalf of said defendants. Thereafter, by notice of motion dated August 28, 1980, the defendant Philips, Appel & Walden (which had already served its answer and joined issue) had joined in making a motion seeking to dismiss the complaint for failure to state a claim upon which relief can be granted and for failure to state with particularity the circumstances constituting fraud.

Following the argument of said motion, the District Court rendered a decision on November 12, 1980, by memorandum opinion and order, wherein it granted the motions to dismiss pursuant to Rule 9b and directed the Trustees to file an amended complaint within thirty (30) days so as to cure the defects which it found existed in the complaint. Thereafter, a more detailed amended

complaint was served, furnishing some of the information which the decision of the District Court noted was lacking; namely, the association and relationship between Jerome Zinn and the various corporate defendants and brokers and, in addition, giving the outside dates between which the fraud alleged in the complaint had taken place. Moreover, the amended complaint identified the parties who had made representations or failed to disclose material information so as to place responsibility upon the appropriate party with far more particularity and clarity. Specifically, the Trustees alleged in this amended complaint (27a) the following:

> "SIXTH: At all times hereinafter mentioned, the defendant, JEROME ZINN (hereinafter referred to as "Zinn", or collectively with the defendant Brokers as the "Defendants"), was at the time of the acts giving rise to this litigation a citizen of the State of New Jersey, and was and still is a registered representative

engaged in the sale and purchase of stocks, bonds and other securities and was acting both individually and/or was employed and/or otherwise engaged and acting for and/or on behalf of the defendants PHILIPS, APEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHOADES, HORNBLOWER & CO., and HAMILTON/COOKE SECURITIES at discrete times, the exact dates not being known at this time."

"TWELFTH: Prior to establishing the accounts as afore-described by the plaintiffs with the defendant Brokers, and in or about 1976, 1977, 1978 and 1979, the County, City and State of New York, the defendant Zinn, on behalf of himself and the co-defendants, had made and did make representations to the plaintiffs, including but not limited to those set forth herein, to the effect that:.."

Paragraph Twelfth continues by enumerating thirty-two specific acts of fraudulent conduct. Due to the frequency of the changes in employment of the defendant, Jerome Zinn, between March 1976 to January 1980, it was impossible for the Trustees at this early stage of the litigation, to determine which brokerage firm he represented at any particular

point in time when he engaged in his fraudulent conduct.

In addition, the amended complaint specified the relationship among the defendants by alleging:

> "FOURTH: Upon information and belief, FIRST WALL STREET SETTLEMENT CORPORATION is and at all times hereinafter mentioned was a wholly owned subsidiary of LOEB, RHOADES, HORNBLOWER & CO and acted for and/or on behalf of LOEB, RHOADES, HORNBLOWER & CO."

> "SEVENTH: Upon information and belief, at all times hereinafter mentioned, FIRST WALL STREET SETTLEMENT CORPORATION was acting for and/or on behalf of LOEB, RHOADES, HORNBLOWER & CO."

and by further alleging:

> "NINTH: Upon information and belief, PHILIPS, APPEL & WALDEN, INC., at certain times hereinafter referred to, the exact dates not being known at this time, was acting for and/or on behalf of FIRST WALL STREET SETTLEMENT CORPORATION and/or LOEB, RHOADES, HORNBLOWER & CO."

Both the complaint and the amended complaint contained extensive and detailed allegations encompassing more than 55 allegations in a 20-page

document of which the count in fraud comprised ten (10) pages and more than one-third of the allegations of the entire complaint. The amended complaint alleged that Jerome Zinn was guilty of numerous acts of misconduct, including representations that investments would be made in "safe stocks." Contrary to these express statements, the proceeds of the accounts were traded in options and other extremely speculative securities. Moreover, information concerning the investments were not transmitted to the Trustees, purchases and sales of securities were consummated for the purpose of generating commissions and without the Trustees' authorization.

Thereafter, by motion dated December 31, 1980, the Defendant First Wall Street Settlement Corporation and Loeb, Rhoades, Hornblower & Co. again moved to dismiss the amended complaint upon the same grounds resulting in a

decision by the District Court, this time dismissing the amended complaint with prejudice on the same grounds, that the amended complaint failed to plead fraud with particularity. The District Court failed to give the Trustees leave to re-plead.

The Court of Appeals affirmed the Order of the District Court from which an appeal is now taken before this Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION DENYING LEAVE TO REPLEAD WAS IMPROPER AND CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND THE CIRCUIT COURTS AS WELL AS WITH GENERAL PRINCIPALS OF LAW

In denying plaintiffs leave to replead, the Court of Appeals acted without basis in the law as established by this Court and the Circuit Courts.

In Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L ed 2d 222 (1962), the Court reiterated the philosophy of Rule 15 of the Federal Rules of Civil Procedure that amendments to pleadings are to be freely granted, even after a complaint has been dismissed. The Court held it error for the Court of Appeals to affirm the denial by the District Court of plaintiffs' motion to vacate the judgment of dismissal in order to allow the complaint to be amended, where the proposed amendment stated an alternative

theory for recovery. The Court stated:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given'."
> (Emphasis supplied)

In the present case, the defendants have demonstrated neither prejudice, nor delay, nor have they asserted that the plaintiffs are acting in bad faith in seeking leave to replead. Indeed, the Federal Rules of Civil Procedure, by general design, discourage the sacrifice of a potentially meritorious claim on the alter of technicality. Foloron Products, Inc. v. Lybrand Ross Bros. & Montgomery,

72 F.R.D. 556 (S.D.N.Y. 1976). There is no question that the plaintiffs have a meritorious claim. Thus, the defendants' motion to dismiss the complaint should have been denied or, in the alternative, the plaintiffs should have been allowed to replead. Kurzweg v. Hotel St. Regis Corp., 309 F.2d 746 (2d Cir. 1962). Indeed, in deciding a motion to dismiss a complaint, all facts and inferences reasonably deducible from the complaint must be construed in favor of the pleader; Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In this manner the plaintiffs should have been given the opportunity to develop whatever proof was available to them so that at the trial they could offer evidence to support their claims as they are set forth in the complaint; Budco, Inc. v. The Big Fight, Inc., 595 F.2d 900, 902

(2d Cir 1979).

In construing the Federal Rules of Civil Procedure and specifically the rules as they relate to a review of a pleading upon an attack [illegible] the pleadings must be viewed on an overall basis to determine whether it contains "a short and plain statement of the claim showing that the pleader is entitled to relief," Rule 8(a)(2).

Thus, while it is recognized that Rule 9(b) requires particularization of the circumstances constituting fraud, this does not abrogate Rule 8(a) which requires short and plain statements in the pleadings; Michelle T. Tomera v. Arthur T. Galt, Jr., 511 F 2d 504 (7th Cir. 1975); Buckley v. Whitelaw, 2 F.R.D. 285 (D C Ill. 1942); C. Wright, Law of Federal Courts, 82 (2d Ed. 1970).

More to the point, no particularity should be required in a pleading when

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the plaintiffs are trustees asserting that third parties for whom they are acting have been defrauded; Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972); Winthrop J. Allegaert v. H. Ross Perot et al., 78 F.R.D. 427 (District Ct. N.Y. 1978). Clearly, as in the present action, when trustees are urging a claim on behalf of third-parties who are beneficiaries of a trust, the force of Rule 15(a) that "leave shall be freely given when justice so requires" to replead, should be at its strongest so as not to prejudice the rights of innocent third party beneficiaries.

Thus, in Segal, supra, 467 F.2d at 607, the Court quoted with approval the following statement by Professors Wright and Miller:

> "When the pleader is asserting that third persons have been defrauded, he may be unable to detail the claim and less particularity should

> be required. Thus simple allegations would suffice for claims of fraud... and primary reliance should be placed on the discovery process for uncovering factual details ..."

Since the plaintiffs are also asserting claims in their capacity as trustees, the lower Courts erred in not relaxing the particularity requirements for pleading fraud.

A reading of the decisions rendered by the District Court reveals that it has chosen to dismiss both the complaint and the amended complaint based upon the alleged finding by it that the plaintiffs did not plead the time, place or contents of the false representations or the relationship among the five defendants.

Issue is taken with this finding inasmuch as in the amended complaint in paragraphs "6", "9" and "12" the defendant Zinn was alleged to have acted on behalf of himself and the co-defendants in

making representations and further, it was alleged in the alternative (paragraph "6" of the complaint) that defendant Zinn was employed or otherwise engaged and acting for and on behalf of the corporate defendant brokers. Obviously, that phase of the original decision of the District Court dated November 12, 1980, stating that the plaintiffs have not established any relationship among the five defendants was satisfied, thus leaving the only real objection to the amended complaint as found by the District Court that the same did not state the time, place and content of the false representations. In this respect, the District Court has overlooked the relationship between Rules 9(b) and Rule 8 where Rule 8(a) requires only a short and plain statement of the nature of the claim in the pleadings which is not to be disregarded

merely because one of the counts of the complaint alleges fraud. 2A Moore's Federal Practice §9.03, page 9-28

In Felton v Walston and Co., Inc., 508 F.2d 557 (2d Cir. 1974), it was held that in a fraud action, if the circumstances constituting fraud are stated with particularity that is sufficient as long as the Court does not lose sight of the fact that the requirement of particularity as set forth in Rule 9(b) is to be harmonized with Rule 8 which requires a short and concise statement of claims.

The District Court did not recognize the certification by the attorneys for the plaintiffs required under Rule 11, F.R.C.P. where, by virtue of the signature of the attorneys for the plaintiffs upon the complaint, the attorney has indicated to the best of his knowledge, information and belief, there are good grounds to support

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the pleading. This casts upon the attorney the affirmative obligation that the attorney is satisfied in good faith that there is good reason to support the claim, Freeman v. Kirby, 27 F R D 395, 397 (S.D.N Y. 1961); Crimmins v. American Stock Exchange, Inc., 368 F Supp 270, 281 (S.D.N Y 1973)

The amended complaint sets forth full details of the wrongs attributed to the defendants. This complied fully with the requirements of the plaintiffs giving notice to the defendants of the nature of the claims asserted against them. The only additional requirement of Rule 9 in fraud actions is that slightly more is needed for notice where the plaintiff is required to state with "particularity" the circumstances constituting the fraud. If the pleading is sufficient to afford the defendants the ability to prepare an answer, that is all which is required to

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satisfy the requirements of Rule 8 F.R.C.P. Thereafter more information can be gathered through discovery. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed 80 (1957)

The attention of this Tribunal is directed to the Official Form 13 which is annexed to the Federal Rules of Civil Procedure as "an appendix of forms" that can be utilized in the Southern District of New York where in most simplistic fashion, a complaint to set aside a fraudulent conveyance is incorporated into four simple non detailed paragraphs including the requisite allegations of jurisdiction. This official form contains little more than a general allegation of fraud and is suitable to meet the pleading requirement under 9(b); Wright & Miller ¶1300 at 425. Wright & Miller at ¶1296 page 407 confirms in

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their treatise that Rule 9(b) requires slightly more notice than would be forthcoming under Rule 8; Felton v. Walston and Co., Inc., supra; Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) A clear reading of the amended complaint shows that the Rule 9(b) requirements are met when circumstances constituting the fraud are alleged sufficiently so that the defendant can prepare an adequate answer to the allegation How in this litigation when the defendant Philips, Appel & Walden has in fact prepared a responsive pleading, can defendants be heard to say that the circumstances constituting the fraud are not sufficiently pleaded with particularity so that they, as the District Court stated in its opinion:

> "Cannot sort out or respond to the many charges contained in the pleading "

See page 14a of the memorandum opinion and order of Mary Johnson Lowe, J., November 12, 1980. (5a)

The complaint pleads the essential elements of a claim based upon fraudulent representations which are: (1) the representation of the material facts, (2) the falsity of that representation, (3) the knowledge of the defendants that the facts are not true, (4) deception of the plaintiffs and (5) injury to the plaintiffs as a result of their reliance upon the misrepresentations; Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 176 N.Y.S.2d 259, 151 N.E. 2d 833 (1958).

It should be noted that the determination made by the District Court in dismissing the complaint on the basis that the plaintiffs had failed to allege time or place as being fatal to the sufficiency of the complaint and the amended

complaint constituted an abuse of discretion and judicial error and was not concomitant with the decisions made by her colleagues as well as by the Second Circuit; Potter's Photographic Applications Co., Inc. v. The Ealing Corporation, 292 F.Supp. 92 (E D N Y 1968); United States v. Gill, 156 F.Supp. 955 (W D Pa. 1957).

It seems as though the District Court would require the pleading of detailed evidentiary matter in order to sustain the sufficiency of the complaint where fraud is alleged. This cannot be reconciled with the precedents in similar cases which do not require under the mandate of Rule 9(b) the pleading of detailed evidentiary matter; 2A Moore's Federal Practice §9.03 at page 2930, Schlick v Penn-Dixie Cement Corp., 507 F 2d 374, 379 (2d Cir 1974), cert. den. 421 U S.

976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975), Walling v. Beverly Enterprises, 476 F 2d 393, 397 (9th Cir. 1973).

In the action at bar, a reading of the complaint shows that it satisfies the requirements of Rule 9(b) inasmuch as plaintiffs have adequately delineated the acts and transactions constituting the fraud to appraise defendants fairly of the claim asserted against them. Before discovery, to require any stricter application of Rule 9(b) would be especially inappropriate where the basis of the dismissal by the District Court was with prejudice and based solely upon the failure to allege time and places of the misrepresentations.

The basis upon which the pleading is asserted against the defendants arises out of "churning" of the accounts of the plaintiffs by the defendant Zinn during

the period of his employment or other association with the various defendant brokers. The complaint alleges that as a result of overtrading by way of purchases and sales of securities and options at the behest of the defendant Zinn for the various accounts of the plaintiffs, including the pension trust account, plaintiffs have sustained monetary damages for which they seek to recover by this action. The motion made by the defendants amounted to nothing more than judgment on the pleadings which if taken as admitted, as is required by our case law, would hardly fail to allege sufficient wrongs against the plaintiffs so as to give the defendants the basis of the charges against them. Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 495 F 2d 228, 231 (2d Cir. 1974), aff'd. 353 F Supp. 264, 268 (S D N Y 1972).

The error committed by the District Court was that it failed to permit further leave to amend the complaint where there was no good reason not to grant it, Foman v Davis, supra. This constituted an abuse of discretion by the District Court especially where the pleading requirement under the Federal Rules of Civil Procedure are liberal and further, and more importantly, where there has been no prejudice sustained by the Defendants. Under Rule 9(f) all pleadings are to be construed so as to do substantial justice and leave to amend shall be freely given (Rule 15(a) F.R.C.P.), and the dismissal of a complaint should be granted only with the greatest reluctance when Plaintiffs have not yet had an opportunity to resort to discovery proceedings to elicit information to substantiate the allegations of the

complaint; Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2d Cir. 1968), cert den. 395 U.S. 906, 89 S Ct. 1747, 23 L.Ed.2d 219 (1969).

There was no reason which operated to prevent the District Judge from permitting plaintiff to serve an amended complaint, whereas in the action at bar, she found that the original amended complaint did not contain sufficient details. It is difficult to see what substantial prejudice would have inured to the detriment of the defendants by permitting a further amendment to the complaint where the details either could be elicited therein, or in the course of extensive discovery with regard to the relationship and level of communication between the defendant Zinn, the defendant brokerage houses and the plaintiffs. Since there was no prejudice that would have been suffered by

the defendants, this leave to amend should have been freely given, United States v Hougham, 364 U S 310, 316, 81 S.Ct. 13, 5 L.Ed 2d 8 (1960); Ricciuti v Voltarc Tubes, Inc., 277 F 2d 809, 814 (2d Cir. 1960). There have been many instances where parties have been permitted to serve amended and second amended and supplemental complaints to narrow the issues and crystallize the pleadings between the parties. This opportunity was not afforded the plaintiffs although well founded in previous precedents; Key Pharmaceuticals, Inc. v. Hans Lowey, 54 F R D. 447, 449 (S D N.Y. 1972); Glazer Steel Corp v Yawata Iron & Steel Co , 56 F R D 75, 79 (S.D.N Y 1972) at 7, 80

All that is requested on this appeal is that this Court reverse the judgment of the Court of Appeals so as to permit the plaintiffs an opportunity to replead

in the event this Court should agree with its determination as is incorporated in both the District Court's original and second opinions.

In the case of Schlick v. Penn-Dixie Cement Corporation, supra, the Court of Appeals had before it a fraud action by a stockholder seeking to recover damages under the securities law. The judge on the District Court level had dismissed the complaint for failure to state a claim upon which relief could be granted basically finding that the complaint was defective in that it failed to show that the misstatements and omissions attributed to the defendants were properly pleaded. The District Court Judge found the complaint defective because it contained "only conclusory allegations without any specific allegations of fraud or deception as required" to support a securities fraud claim. The Second

Circuit reversed the dismissal by the District Court Judge holding that the complainant was not required to plead evidence; Brady v Games, 76 U.S.App. D.C. 47, 128 F.2d 754, 755 (1942), Collins v. Rukin, 342 F Supp 1282, 1292, (D.Mass. 1972), but that the particularity requirement may be satisfied where the allegations are accompanied by a statement of the facts upon which the belief is founded. The Schlick decision cited Lee v. Alabama, 364 F 2d 945 (5th Cir 1966); and Duane v. Altenburg, 297 F 2d 515, 518 (7th Cir 1962) along with 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil §1298 at 416 (1969) The Second Circuit opinion went on to state at page 379 of 507 F 2d that:

> "In any event, Rule 9 must be construed in conjunction with Rule 8, id.; Carroll v First National Bank of Lincolnwood, 413 F.2d 353 (7th Cir. 1969),

cert denied, 396 U.S. 1003, 90 S.Ct. 552, 24 L.Ed.2d 494 (1970) "

In the action at bar, there is extensive particularity which details the wrongs attributed to the defendant Zinn, which, on the basis of the doctrine of respondeat superior makes responsible the co-defendant-broker-employers with whom he is associated or by whom he is employed for his conduct. Merely because the plaintiff has been unable to pinpoint the exact dates between which Jerome Zinn worked for each employer at this early juncture of the pleadings, should be no reason why the plaintiffs should be deprived of their just day in Court for a trial on the merits. Following the law in the Second Circuit in Lowenschuss v. Kane, 520 F.2d 255, 263 (2d Cir. 1975) and Mooney v. Vitolo, 435 F.2d 838, 839, (2d Cir. 1970), plaintiffs who have not had any access to the records of the

defendants and have been given only one opportunity to replead, cannot and should not have had their claims dismissed without further leave to amend; Felton v. Walson and Co., Inc., supra at 580, 582, where a complaint was dismissed with prejudice on the fourth amended complaint after three prior unsuccessful attempts to replead.

Had it not been satisfied with the allegations of the amended complaint, the more equitable approach would have been for the District Court or even the Circuit Court to give the plaintiffs an opportunity to replead. This same procedure was followed in Gross v. Diversified Mtge. Investors, et al., 438 F Supp 190 (S.D.N.Y. 1977) where the Court dismissed the fourth amended complaint with leave to replead. However, Judge Gagliardi in taking an equitable approach

to the difficulties in pleading experienced by the plaintiffs was liberal in accordance with the usual liberal approach followed by the Federal Rules of Civil Procedure.

In either instance, plaintiffs have wrongfully been dismissed in the early stages of their attempts to prosecute this action. The District Court Judge should not have dismissed the complaint inasmuch as the amended complaint did plead sufficient particularity albeit much of it was of an evidentiary nature (which the District Court Judge apparently wanted included in the complaint) with enough detail so as to afford the defendants the opportunity and ability to prepare an intelligent responsive pleading. This was indeed the result with respect to the defendant Philips, Appel & Walden whose answer responded to the original complaint.

Their motion to dismiss the complaint was an afterthought which was made following the first motion to dismiss made on behalf of the co-defendant corporate brokers. The defendant Phillips, Appel & Walden, obviously jumped on the bandwagon and complained about the insufficiency of the complaint despite the fact that they had already pleaded to it. Since the criteria laid down for determining the sufficiency of the complaint in fraud is whether a responsive pleading can be prepared, the plea by the defendants of the insufficiency of the complaint is belied by the fact that they were able to respond to it.

Despite the fact that the defendants claim that the complaint is insufficient in its allegations with what has been deemed satisfactory in other cases, the complaint pleads enough detail to give

adequate notice for a responsive pleading (which in fact was prepared), and there was not cause to grant the motion by the defendants to dismiss; C. Wright & A. Miller, supra at § 296, page 415.

The complaint in the action at bar alleges in essence that the defendants made certain misrepresentations or concealed certain information which was known to them and when made were known to be false. It further alleges that the plaintiffs relied upon these misrepresentations to their detriment at a time when the representations were made by the defendants with the specific intent of having the plaintiffs rely upon the same and act upon the same. This is more than sufficient to plead even a common law fraud which District Courts, both in the Southern District as well as in other jurisdictions, have been held to be sufficient to meet the requirements of Rule

9(b) F.R.C.P.; Dack v. Shurman, 227 F. Supp. 26, 29 (S.D.N.Y. 1964); Miller v. Bargain City, U.S.A., Inc., 229 F.Supp. 33, 40 (E.D.Pa. 1964); see also 63 Mich. L. Rev. 1070, 1080 (1965).

A similar occurrence was the subject of an opinion in the Northern District Court of California in the case of Anspach v. Best Line Products, 382 F. Supp. 1083 (N.D. Cal. 1974) where a defendant moved to dismiss a complaint for fraud alleging that the same failed to meet the requirements of particularity as set forth in Rule 9(b) of the F.R.C.P. Specifically, the defendant therein contended that the complaint failed to state which individual made each of the representations. The Court held that Rule 9(b) did not require nor make legitimate the pleading of detailed evidentiary matter, but only required the identification of the circumstances constituting

fraud so that the defendants can prepare an adequate answer from the allegations citing Walling v. Beverly Enterprises, supra. The Court indicated that the complaint met the standards of sufficiency where the complaint informed the defendants of the conduct which plaintiffs believed to be fraudulent giving them more than sufficient notice to prepare the defense; Affiliated Ute Citizens v. United States, 406 U.S. 128, 149-154, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), which required a complaint only to predicate the plaintiff's right to relief on the claim with only loose connections to common law fraud actions.

In the action at bar the absolute and conclusive nature of the proof that the complaint did meet the particularity requirement of Rule 9(b) is found in the fact that the defendant Philips Appel & Walden did in fact prepare and serve an

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answer to the original complaint. What better evidence is there of the ability to prepare a responsive pleading by an objecting defendant than his own pleading? Clearly, the complaint insofar as it is considered to allege fraud, meets the standards of Rule 9(b) which discovery and trial of the issues would then be used as a supplement for any claimed deficiencies in identification of time, place or individuals involved in the fraud; Bird v. Ferry, 51 F.R.D. 310 (D.C.Ga. 1970)

Plaintiffs are not looking to litigate the sufficiency of the proof which will be required of them at the time of trial, but merely seek to have the complaint utilized at the District Court level for purposes of giving the defendants notice of the wrongs attributed to them, sufficient for them to prepare

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a responsive pleading. In such a situation, it would shock the equitable conscience of men were the plaintiffs not to be permitted to be given the benefit of all opportunities to litigate this case on the merits. Inasmuch as the jurisdiction of this Court has properly been invoked in the complaint, the District Court should have denied the motions to dismiss inasmuch as the responsive pleadings, once having been prepared, served and filed was sufficient to bring the issues before it for purposes of litigating this matter at a plenary trial on the merits. As this circuit previously held in Kurzweg v. Hotels St. Regis Corp., 309 F 2d 746 (2d Cir. 1962), the motion to dismiss should have been denied unless it was clear that no reasonable interpretation of the facts alleged could support the plaintiff's claim for relief. On the

other hand, if for whatever reason the District Court Judge chose to recognize the challenge to the complaint and the amended complaint, it should have given leave to the plaintiffs to replead once again rather than to sacrifice the rights of the plaintiffs on their meritorious claims rather than to dismiss them on a technicality. As the Supreme Court has observed previously, a party

> "Ought to be afforded an opportunity to test his claim on the merits."

Foman v. Davis, supra, unless the defendants were able to demonstrate that they will suffer actual prejudice by the Court granting leave to amend; Roloff v. Arabian-American Oil Co., 421 F 2d 240, 242 (2d Cir. 1970); Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F 2d 380 (2d Cir. 1968)

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The District Court Judge abused its discretion in dismissing the complaint without giving leave to the plaintiffs to amend. The disposition of justice based upon technical dismissal is not the type of justice which should be dispensed by our Courts. In other cases, even within the Southern District of New York, the District Judges have been most liberal and lenient in permitting repeated amendments of pleadings so as to afford a litigant an opportunity to have his "day in Court" on the merits even where a request to amend the complaint was made by counsel as an afterthought requesting leave to plead a completely different theory from that set forth in the original complaint. Greene v Wolf Corp., 50 F.R.D 220, 223 (S.D.N.Y 1970)

The discretion of the District Judge and Court of Appeals should have been

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exercised in favor of permitting the amended complaint to stand for responsive purposes with a full opportunity given to the plaintiffs to develop the proof of the allegations alleged in the complaint after joinder of issue through whatever discovery devices they chose to utilize. While this would have been the far better approach for the District Court to follow in any event where the District Court otherwise elected to find the amended complaint insufficient, it should have in all respects exercised its unbounded discretion to permit the plaintiffs to further amend the complaint; 3 Moore's Federal Practice ¶15.08(6), at N.4, 896-897 (second edition 1974). This was the approach utilized by District Judge Connor in the decision of Polaroid Products, Inc. v. Lybrand Ross Bros. & Montgomery, 72 F.R.D. 550 (S.D.N.Y. 1976).

In all respects, with the dismissal of the action by the District Court and the affirmance by the Court of Appeals, the plaintiffs have not been afforded their just due of litigating this matter on the merits. Since the defendants have been adequately given notice of the nature of this action, as is set forth in the amended complaint, they have sufficient protection to prepare the responsive pleading (as in fact has been done by the defendant Philips, Appel & Walden with respect to the original complaint) and to properly prepare their defenses for trial; Roth v A H Robins Co., 607 F.2d 545, 557 (2d Cir. 1979), cert den ___U.S.___, 100 S Ct 2175 (1980).

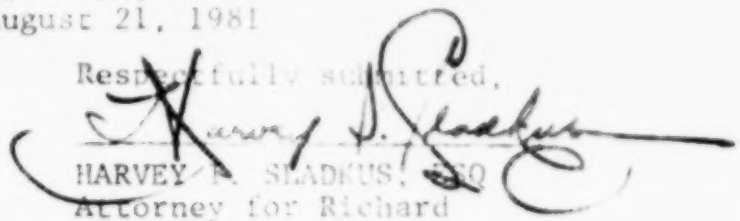
CONCLUSION

For the reasons heretofore presented and upon the entire record of the Court below, it is respectfully urged that the

order and judgment appealed from be reversed, and remanded to the District Court together with an award of costs and disbursements

Dated: New York, N.Y.
August 21, 1981

Respectfully submitted,



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APPENDIX A

ORDER OF THE COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of June, one thousand nine hundred and eighty-one.

Present:

HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,

Circuit Judges.

RICHARD BREW and FRANCES M. BREW, As Trustees of the 156 East Cafe Profit Sharing Trust,

Plaintiffs-Appellants

v.

Docket No. 81-7157

PHILIPS, APPEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHODES, HORNBLOWER & CO., HAMILTON/ COOKE SECURITIES CORP. and JEROME ZINN,

Defendants.

PHILIPS, APPEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHODES, HORNBLOWER & CO.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons set forth in Judge Lowe's opinions dated January 30, 1981 and November 12, 1980.

The appeal is from a judgment entered on the district Court's opinion granting defendants' motion to dismiss appellants' amended complaint pursuant to Fed.R.Civ.P 9(b), for failure to allege fraud with particularity We

agree with the district court that appellants, in both their initial and amended complaints, have failed to identify with the requisite particularity the instances of fraud on which they base their claim.

Even assuming, arguendo, that appellee Philips, Appel & Walden's filing of an answer to the initial complaint indicated that it, and perhaps other appellees, had sufficient notice of the claims against them, the other requirements which this Court repeatedly has held underlie Rule 9(b) would not be satisfied. Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2 Cir. 1979), cert. denied, 446 U.S. 946 (1980); Denny v. Barber, 576 F.2d 465, 469-70 (2 Cir. 1978).

No party has a right to multiple opportunities to amend before a complaint will be dismissed. Denny, supra, 576

F.2d at 471. Where, as here, appellants were given adequate opportunity to amend along the lines suggested and to correct the deficiencies indicated in the district Court's first opinion, and failed to do so, dismissal of the complaint was a proper exercise of discretion.

LEONARD P. MOORE
UNITED STATES CIRCUIT JUDGE

WILLIAM H. TIMBERS
UNITED STATES CIRCUIT JUDGE

THOMAS J. MESKILL
UNITED STATES CIRCUIT JUDGE

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Judgment entered June 1, 1981

APPENDIX B
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RICHARD BREW, et al.,

Plaintiff,

-against-

PHILIPS, APPEL & WALDEN, INC., et al.,

Defendants.

----------X

MEMORANDUM OPINION AND ORDER

80 Civ. 3703 (MJL)

APPEARANCES (See Last Page)

MARY JOHNSON LOWE, D. J.

This action is brought under the Securities Act of 1933 and the Securities Exchange Act of 1934, as amended (15 U.S.C. &&77a-77aa and 15 U.S.C. §§78a et seq., respectively) for compensatory and punitive damages. Two separate motions to dismiss the complaint have

been made, claiming lack of jurisdiction over the subject matter (Fed R. Civ. P. 12(b)(1)), failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)), and failure to plead fraud with particularity (Fed. R. Civ. P. 9(b)). For the reasons stated below, the motions pursuant to Rules 12(b)(1) and 12(b)(6) are denied. The motions to dismiss under Rule 9(b) are granted, with leave to plaintiffs to file an amended complaint pursuant to Rule 15(a).

FACTUAL BACKGROUND

On June 30, 1980, plaintiffs Richard and Francis Brew filed a complaint against the five defendants alleging violations of "the Securities Act of 1933 and 1934, as amended."[1/]

1/Plaintiff's Complaint at 2. The Complaint does not specify the section or sections upon which relief is requested

They invoke this Court's jurisdiction under 28 U.S.C. §§1331, 1332, and 1337, and request relief of more than $1,100,000 in compensatory and punitive damages. The claims arise from an unspecified series of transactions in which plaintiffs claim the defendant brokers, or their agent (defendant Zinn), were "negligent, reckless and careless" in managing the accounts plaintiffs established with them.[2/] Plaintiffs also claim that the defendants made false representations concerning their experience, qualifications and services, that they did not fulfill express promises concerning their brokerage services, that they engaged in "churning," that they failed to disclose fair and accu-

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2/ The complaint states that brokerage accounts were established with "the defendant brokers" on or about March 16, 1976. Id.

rate reports and information, and that they engaged in self-dealing with respect to securities held by them.

Defendant Philips, Appel & Walden, Inc., answered the Complaint and then moved to dismiss it on August 28, 1980, under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b). Defendant First Wall Street Settlement Corporation and Loeb Rhoades, Hornblower & Co. moved to dismiss on the same day, incorporating the Memorandum of Law of Philips, Appel & Walden and basing their motion on the same rules.[3/] Plaintiffs filed opposing papers to the motions, arguing alternatively that they should be permitted to amend their complaint under Rule 15(a) or to supply a more definite statement under Rule 12(e).

3/ Defendants Jerome Zinn and Hamilton/Cook Securities Corp. have not filed papers.

CONCLUSIONS OF LAW

(1)

Subject Matter Jurisdiction

The Court has jurisdiction over the federal and state claims advanced in the complaint. Although the pleading lacks specificity (see infra, section (3)) it clearly raises substantial, non-frivolous issues of federal law. No more is required to establish federal question jurisdiction in the district courts under 28 U.S.C. §1331. See Hagans v. Lavine, 415 U.S. 528, 537-38 (1974); Bell v. Hood, 327 U.S. 678, 682-3 (1946).

(2)

Failure To State A Claim

Defendants argue that the complaint asserts only state law claims. Since complete diversity is lacking among the parties, they conclude that plaintiffs have stated no claim upon which relief can be granted.

The Court disagrees. Although the pleading is not well organized, it alleges facts sufficient to state a claim under §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78(j)(b)) and Rule 10b-5 (10 C.F.R. §240.10b-5)promulgated pursuant thereto. Plaintiffs' allegations suggest: (1) a fiduciary relationship among the parties, (2) the existence of misrepresentations of fact or omissions of fact, (3) a connection with the sale or purchase of securities, (4) knowing intent to defraud or reckless disregard of the misleading nature of the representations, (5) causation, (6) reliance, (7) damages, and (8) use of instrumentalities of interstate commerce. See, e.g., Complaint ¶¶9, 19, 20, 33-37. The sole element that cannot readily be inferred is "materiality" of the misrepresentations or omissions. However, the plaintiffs should be per-

mitted to cure this defect by amending the complaint to conform with the requirements of Rule 9(b).

Therefore, the Court finds that the allegations, if true, would state a claim for fraudulent omission of material information or for knowing recommendation for unsuitable securities with knowledge that those securities were unsuitable and with the intent to obtain a financial benefit. See Clark v. John Lamula Inv., Inc. 583 F.2d 594, 599-600 (2d Cir. 1978). Defendant's main argument, that scienter has not been alleged,[4/] is ill-founded. Although the complaint is laced with the language of negligence (e.g., "misinformation", "mismanagement", "carelessness"), plaintiff also claims that defendants: (1)

4/ Defendant Philips, Appel & Walden, Inc.'s Memorandum of Law at 7-8.

"engaged substantially in . . . churning" (Complaint at 5); (2) "were otherwise in position of conflict of interest since [they] were trading on behalf of themselves in the same or similar securities or options..." (id. at 5, 6); and (3) furnished reports that were inaccurate, misleading and "motivated solely for the purpose of generating commissions" for the defendants (id at 11). At this stage of the proceedings, those claims are sufficient to make out the requisite proof of intent to defraud under §10(b).

(3)

Particularity

Rule 9(b) of the Federal Rules of Civil Procedure requires:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

That rule applies to a complaint alleging violation of the Securities Exchange

Act of 1934. See Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir 1979) cert denied, ____ U.S. ____, 100 S. Ct. 2175 (1980); Stromfeld v. Great Atlantic & Pac. Tea Co., Inc., 484 Supp. 1264, 1269-70 (S.D.N.Y. 1980); Fychs v. Swanton Corp., 482 F. Supp. 83 (S.D.N.Y. 1979). Particularity is required in order to give adequate notice and information to the defendant to enable him to prepare responsive papers[5/] and to protect defendants from the harm to reputation resulting from spurious claims.[6/]

Plaintiffs have not complied with Rule 9(b). First, the complaint does not indicate the time, place or contents of the false representations. Second, plaintiffs have not identified the par-

5/ See 5 Wright & Miller, Federal Practice Procedures, Civil §1298 at 415 (1969)

6/ See Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979); Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978).

ties making the representations or failing to disclose material information. Likewise, it is impossible to glean from the complaint which defendant was responsible for which act, or what benefit anyone derived from the transactions. Finally, plaintiffs have not established any relationship among the five defendants.[7/] As a result, the defendants cannot sort out or respond to the many charges contained in the pleadings.

CONCLUSION

Defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted are denied. The motions to dismiss pursuant to Rule 9(b)

7/ "Consequently, 'each defendant [has not been] apprised of the circumstances surrounding the fraudulent conduct with which he stands charged.'" Stromfeld v. Great Atlantic & Pac. Tea Co., Inc., 484 F. Supp. 1264, 1270 (S.D.N.Y. 1980), citing Jackson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 522 n.7 (S.D.N.Y. 1977).

are granted. Plaintiffs may file an amended complaint within thirty days from the date of this order so as to cure the defects in their present complaint.

It Is So Ordered.

United States District Judge

Dated: November 12, 1980
New York, New York

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APPENDIX C
ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RICHARD BREW, et al.,

Plaintiff,

-against-

PHILIPS, APPEL & WALDEN, INC., et al.,

Defendants.

----------X

MEMORANDUM OPINION AND ORDER

80 Civ. 3703

APPEARANCES (See Last Page)

MARY JOHNSON LOWE, D. J.

Plaintiffs' complaint in this action for violation of the federal securities laws were dismissed on November 12, 1980, with leave to amend within thirty days. The Court found that the complaint did not satisfy the requirements of Rule 9(b) of the Federal

Rules of Civil Procedure for pleading fraud.[1] Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, plaintiffs filed an amended complaint on December 12, 1980. Thereafter, defendants again moved to dismiss the complaint for failure to plead fraud with particularity. Oral arguments were heard by the Court on January 23, 1981.[2]

DISCUSSION OF LAW

The Second Circuit Court of Appeals observed recently that the "particular-

1/ Rule 9(b) requires, in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." It is well settled that Rule 9(b) applies in actions brought under the federal securities laws. See Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979), cert denied, ___ U.S. ___, 100 S.Ct. 2175 (1980); Denny v. Barber, 576 F.2d 465 (2d Cir. 1978); Stromfeld v. Great Atlantic & Pac. Tea Co., Inc., 484 F. Supp. 1264 (S.D.N.Y. 1980); Fuchs v. Swanton Corp., 482 F. Supp. 83, 91 (S.D.N.Y. 1979); In re Haven Industries, Inc., 462 F. Supp. 172 (S.D.N.Y. 1978).

2/ The Court of Appeals acknowledged the usefulness of hearings to consider a motion to dismiss a complaint that has once been amended pursuant to a court dismissal under Rule 9(b). Denny v. Barber, 576 F.2d 465, 468 (2d Cir. 1978).

ity" requirement of Rule 9(b) generally serves three important purposes:

> First, it assures the defendant of '"fair notice of what the plaintiff's claim is and the grounds upon which it rests."' [citations omitted] Secondly, the specificity requirement grows out of 'the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing...'

Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir 1979), cert. denied, ___ U.S. ___, 100 S. Ct. 2175 (1980), quoting Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972). See Denny v. Barber, 576 F.2d 465 (2d Cir. 1978).

Third, in securities litigation, the rule

> operates to diminish the possibility that '"a plaintiff with a largely groundless claim [will be able] to simply take up the time of a number of other people [by extensive discovery], with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence...'" [citations omitted]

Ross, supra at 557, quoting Denny, supra at 470.

The deficiencies identified in the original complaint by the Court in this action were:

> First, the complaint does not indicate the time, place or contents of the false representations. Second, plaintiffs have not identified the parties making the representations or failing to disclose material information. Likewise, it is impossible to glean from the complaint which defendant was responsible for which act, or what benefit anyone derived from the transactions. Finally, plaintiffs have not established any relationship among the five defendants. As a result, the defendants cannot sort out or respond to the many charges contained in the pleadings (footnote omitted) Memorandum Opinion and Order at 8, dated November 12, 1980.

The amended complaint does little to rectify the short-comings of the original and does not afford the defendants "a reasonable opportunity to answer the complaint" nor give "adequate information to frame a response." Ross, supra at

557-558. Paragraph 12 of the amended complaint alleges that "in or about 1976, 1977, 1978, and 1979, in the County, City and State of New York, the defendant Zinn, [3/] on behalf of himself and the co-defendants" made allegedly false representations to the plaintiffs. [4/] In describing the complicity of the defendants and their respective roles in the alleged fraud, plaintiffs merely claim in paragraph 6 that defendant Zinn "was acting both individually and/or was employed and/or was otherwise engaged and acting for and on behalf of

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3/ At the time of the allegedly fraudulent securities transactions, defendant Zinn was a registered representative engaged in the sale and purchase of securities. Amended Complaint ¶6. He has not been served in this action.

4/ See Ross, supra at 558 ("And, of course, plaintiffs must fix the time when these particular events occurred.")

the defendants ... at discrete times, the exact dates not being known at this time."

These undifferentiated general allegations against the collective defendants do not give adequate notice of the charges against each or any of them. Dismissal of the amended complaint is therefore warranted. A similar finding was made in Stromfeld, supra at 1270. One of the reasons the court gave for dismissing the complaint in that action was that it did not "distinguish one defendant from another. Consequently, 'each defendant [had not been] apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged.' [citation omitted]."[5/] The Court also found that

5/ See In re Haven Industries, Inc., supra at 133; Jacobsen v. Peat, Marwick Mitchell & Co., 445 F. Supp. 518, 522 N. 7 (S.D.N.Y. 1977) ("each defendant

(cont. following page)

5/ (continued) named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he stands charged."). This error is not cured by plaintiffs' added allegations "on information and belief" that various defendants either were controlled by or acted through the others. Ordinarily, the allegations in a complaint based on fraud may not rest solely on information and belief. See Denny v. Barber, 576 F.2d 465, 470 (2d Circ. 1978) Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 (2d Cir. 1974); Segal v. Gordon, 467 F2d 602, 608 (2d Cir. 1972); Stromfeld, supra at 1270; Jacobsen, supra at 522. However, matters that are "peculiarly within the adverse party's knowledge" may be alleged on information and belief if the facts upon which the beliefs are founded are set out by plaintiffs. See Schlick, supra at 379; Segal, supra at 608. Plaintiffs here have not furnished any information that would exempt them from the general rule. Unlike plaintiffs in derivative suits, the present plaintiffs dealt personally with the broker Zinn, a co-defendant, and received confirmation of the transactions alleged. Therefore, the relevant matters are not solely within the knowledge of the adverse parties.

plaintiff did not "provide specifics as to which of the particular defendants were involved in what capacities, when these alleged misappropriations of information occurred, and what corporate assets and opportunities were converted." Id.

It is not sufficient, as plaintiffs urge, that more detailed charges might be brought after discovery has commenced. (Affidavit of Coffee, ¶¶3a, 5c, 6, & 10 and 12) As stated recently by a California district court,[6/] citing the Second Circuit decisions in Denny and Segal, supra, that reasoning would encourage "detail following discovery" in every case. The Court of Appeals has rejected such an approach to securities litigation. See Ross, supra at 557 and

6/ McFarland v. Memorex Corp., 493 F. Supp. 631, 636 (N.D. Calif., 1980)

Denny, supra at 470, citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975); Segal, supra at 609. The district court in Denny, whose opinion was affirmed in full by the Second Circuit, summed up as follows:

> Complaints should not be conceived merely as tokens, guaranteeing access to a world of discovery ... Neither plaintiff nor his counsel are entitled to roam through a defendant's files at the mere drop of a 'complaint'

CONCLUSION

Defendants' motion to dismiss the amended complaint for failure to plead fraud with particularity is granted, with prejudice.

It Is So Ordered.

United States District Judge

Dated: January 30, 1981
New York, New York

Judgment entered February 5, 1981

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APPENDEX D
PLAINTIFFS' AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RICHARD BREW, et al.,

Plaintiff,

-against-

PHILIPS, APPEL & WALDEN INC.,
et al.,

Defendants.

----------X

80 Civ. 3703 (M.L.J.)

Plaintiffs complain of defendants by their attorneys, DUECK & SLADKUS ESQS., and respectfully set forth to this Court as follows:

FIRST COUNT

FIRST: At all times hereinafter mentioned, plaintiffs RICHARD BREW and FRANCES BREW, were and still are citizens of the State of New Jersey.

SECOND: At all times hereinafter

mentioned, plaintiffs were and still are Trustees of the 156 East Cafe Profit Sharing Trust (hereinafter referred to as the "Trust") by an agreement bearing date January 1, 1968, and have acted as such up to the date of the commencement of this action.

THIRD: At all times hereinafter mentioned, defendants FIRST WALL STREET SETTLEMENT CORPORATION LOEB RHOADES, HORNBLOWER & CO., PHILIPS, APPLL & WALDEN, INC. and HAMILTON/COOKE SECURITIES CORP. (hereinafter referred to collectively as the "Brokers", or collectively with the defendant Zinn as the "Defendants"), were and still are corporations organized and existing under the laws of the State of New York, maintaining their principal offices within the City and State of New York, except for the defendant HAMILTON/ COOKS SECURITIES CORP which is a

corporation existing under the laws of the State of New Jersey.

FOURTH: Upon information and belief, FIRST WALL STREET SETTLEMENT CORPORATION is and at all times hereinafter mentioned was a wholly owned subsidiary of LOEB, RHOADES, HORNBLOWER & CO., and acted for and/or on behalf of LOEB, RHOADES, HORNBLOWER & CO.

FIFTH: The defendant Brokers are member firms of the New York and American Stock Exchanges, the Chicago Mercantile Exchange and other stock and commodity exchanges, and are engaged in the business of purchasing and selling stocks, bonds and other securities (hereinafter collectively referred to as "Securities") for and on behalf of their customers, for profit.

SIXTH: At all times hereinafter mentioned, the defendant, JEROME ZINN (hereinafter referred to as "Zinn", or col-

lectively with the defendant Brokers as the "Defendants"), was at the time of the acts giving rise to this litigation a citizen of the State of New Jersey and was and still is a registered representative engaged in the sale and purchase of stocks, bonds and other securities and was acting both individually and/or was employed and/or otherwise engaged and acting for and/or on behalf of the defendants PHILIPS, APPEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHOADES, HORNBLOWER & CO., and HAMILTON/COOKE SECURITIES at discrete times, the exact dates not being known at this time.

SEVENTH: Upon information and belief, at all times hereinafter mentioned, FIRST WALL STREET SETTLEMENT CORPORATION was acting for an/or behalf of LOEB, RHOADES, HORNBLOWER & CO.

EIGHTH: Upon information and belief, at all times hereinafter mentioned, HAMILTON/COOKE SECURITILS CORP. was acting for and/or on behalf of FIRST WALL STREET SETTLEMENT CORPORATION and/or LOEB RHOADES HORNBLOWER & CO.

NINTH: Upon information and belief, PHILIPS, APPEL & WALDEN, INC. at certain times hereinafter referred to, the exact dates not being known at this time, was acting for and/or on behalf of FIRST WALL STREET SETTLEMENT CORPORATION and/or LOEB, RHOADES, HORNBLOWER & CO.

TENTH: The matters in controversy, exclusive of interest and costs, exceed the sum of Ten Thousand ($10,000.00) Dollars, and this Court has jurisdiction by the provisions of 28 U.S.C. Sections 1331, 1332 and 1337 and under the Securities Acts of 1933 and 1934, as amended.

ELEVENTH: On or about the 18th day of March, 1976, the plaintiffs established brokerage accounts with the defendant Brokers for the purpose of making investments for themselves individually as well as for the Trust of which they are Trustees, with the statement made to defendant Zinn that plaintiffs had limited background and experience in the securities field and had had unfavorable results previously with securities investments.

TWELFTH: Prior to establishing the accounts as aforedescribed by the plaintiffs with the defendant Brokers, and in or about 1976, 1977, 1978 and 1979, in the County, City and State of New York, the defendant Zinn, on behalf of himself and the co-defendants, had made and did make representations to the plaintiffs, including, but not limited to those set forth herein, to the effect that:

a. defendants had a great deal of experience in the investment of "securities" and that they did an extensive amount of securities investment for pension plans and profit sharing plans, as well as for individuals;

b. defendants had great experience in investments based upon extensive research facilities, excellent contacts, connections and experience, and defendant Brokers, upon information and belief, made representations to that effect in their brochures and advertising matter;

c. defendants would have their most competent and expert people managing and reviewing the plaintiffs' accounts, advising, counselling and recommending investment transactions according to daily and weekly conditions, and where required, on momentary or immediate bases;

d. defendants would have their most competent and expert technical advisors, and defendant Zinn personally, at the plaintiffs' disposal at all times, for the dissemination of information giving specific trading advice and reasons for this advise, and if any questions existed, telephone communication would be available to their specialists and information relayed immediately to the plaintiffs;

e. defendants would furnish the plaintiffs with fair and accurate reports with respect to the areas or confines in which they intended to invest, which would be expert, accurate, scientific and extensive, upon all of which they could place full and safe reliance in making decisions within the areas of the subject matter of said reports;

f. in the event the plaintiffs

established and maintained accounts with the defendants, their investments would be extremely safe, like "money in the bank", that plaintiffs' purchases would be in very safe stocks which would give at least twelve (12%) per cent in return by dividends and sales of options and that in doing so, they would be given expert supervision and advice by specialists familiar with areas of investment for them;

g. the defendants, with the use of all of their experts, statisticians and researchers, and their facilities, which were represented to be the best in the country and probably the world, stated that the plaintiffs would make a great deal of money with them, if their investment advice and recommendations were followed;

h. the plaintiffs would have the benefit and use of all of the defen-

dants' research staff and facilities and would be given the benefit of their confidential reports;

i. the defendants' research facilities and reports were based upon first-hand information from expert individuals, whom the defendant Brokers employed in the various market centers throughout the country and the world;

j. the defendants, through their representatives, would maintain strict surveillance and supervision over the plaintiffs' investments and the plaintiffs would be constantly and continuously kept advised of all developments affecting their investments as they occurred;

k. the plaintiffs would otherwise receive the benefit of the full extent of all of the services and advice of the defendants and their staffs and facilities through their market reports

and letters and any other information to which they were privy.

l. since RICHARD BREW and FRANCIS M. BREW would have substantial personal liability for any losses to be incurred arising out of the investments of the funds of the 150 EAST CAFE PROFIT SHARING TRUST, that the type of investments best suited for the trust was in the area of stock options.

m. that the accounts maintained by the plaintiffs were "making money"

n that the accounts maintained by the plaintiffs were "doing well"

o. that notices of margin deficiencies and "Short Positions" were standard procedure in the securities business, were without significance and did not reflect the true position of the accounts maintained by plaintiffs and that at the time of said notices the accounts were, in fact, "making money."

p. that the defendants would trade the accounts of the plaintiffs in non-speculative ventures and in a sound and conservative manner likely to yield steady sums of money.

q. that in the event plaintiffs execute a power of attorney-in-fact in favor of the defendants or one or more of the defendants, that pursuant to said power the defendants would trade in conservative non-speculative investments.

THIRTEENTH: Upon information and belief, the aforesaid representations so made by the defendants were false and fraudulent, since in truth and fact the defendants:

a. never intended and in fact did not have their most competent and expert specialists managing plaintiffs' accounts, or advising, counselling and recommending investment transactions, but instead had the plaintiffs' accounts

managed solely by defendant Zinn who was engaged substantially in trading and "churning" common stocks and options for plaintiffs and others, and who was not equipped to manage a trust or fiduciary account in a skilled and professionally competent manner, who had not made money trading options for his own accounts, and who, except occasionally, did not transmit any information to the plaintiffs concerning their investments, all of which violated a fundamental basic concept of investments for fiduciary and income investment and conservative accounts;

b. never had any competent or expert advisers and specialists at the plaintiffs' disposal, but who were otherwise in a position of conflict of interest since defendants were trading on behalf of themselves in the same or similar securities or options in which

the investments were made for the plaintiffs. In addition, they rarely and infrequently communicated with either of the plaintiffs to transmit, counsel and advise for investment purchases or sales;

c. on no occasions furnished any reports to the plaintiffs relating to the subject matter in which the plaintiffs' monies were available or utilized to purchase and sell securities and options, and when reports were available, they were not furnished to plaintiffs;

d. when purchases or sales were made, they were not made for investment purposes but to generate commissions running into several thousands of dollars which was solely for the benefit of the defendants and against the interests of the plaintiffs. These purchases and sales for the accounts of the plaintiffs

were also contrary to the position which was enjoyed by the defendants, or some of them, in the same securities for their own account;

e. never had any intention of, and in fact, after plaintiffs established the accounts, actually did not have any investment specialists supervise plaintiffs' accounts or give advice with respect to their investments;

f. the defendants, or some of them, did not have adequate facilities or backgrounds for selecting securities or options investments, and specifically in that the defendant Brokers, or either of them, employed limited, if any, experts or researchers, or did not make them available to plaintiffs, they employed people who were totally lacking in their method of training, and further that much, if not all, of their information was not of a first-hand basis and not ob-

tained by verification of information other than from secondary or tertiary sources;

g. caused the plaintiffs, after establishing their accounts with the defendants, to lose great sums of their money based upon negligent, reckless and, upon information and belief, wrong and improper action was taken while the defendants were in a position of conflict of interest, trading the same or similar securities for their own accounts;

h. did not provide any of the purported facilities to the plaintiffs in order to enable plaintiffs to make intelligent or knowledgeable decisions with respect to their investments, and did not make their research facilities, staff or confidential reports available to plaintiffs;

i. did not disclose to plaintiffs when said representations were made

that a very high number of its customers investing or dealing in trading of securities or options lost money.

j. did not have anyone in various parts of the country and world furnishing first-hand information, but the defendants used secondary and tertiary sources of information which, in turn, was disseminated to members of the general public including the plaintiffs, without verification of the accuracy thereof.

k. since RICHARD BREW and FRANCIS M. BREW would have substantial personal liability for any losses to be incurred arising out of the investments of the funds of the 156 EAST CAFE PROFIT SHARING TRUST, that the type of investments best suited for the trust was not in the area of stock options.

l. the accounts maintained by the plaintiffs were not "making money",

m. the "accounts maintained by the plaintiffs were not "doing well".

n. notices of margin deficiencies and "short positions" were not standard procedure in the securities business, were not without significance, and did reflect the true position of the accounts maintained by plaintiffs and that at the time of said notices the accounts were, in fact, not "making money".

o. the defendants would not and did not trade the accounts of the plaintiffs in non-speculative ventures and in a sound and conservative manner likely to yield steady sums of money.

p. in the event plaintiffs did execute a power of attorney-in-fact in favor of the defendants or one or more of the defendants and pursuant to said power the defendants did not trade in conservative non-speculative interests.

FOURTEENTH: Upon information and belief, at the time the aforesaid representations were made, either they were not believed by the defendants to be true or were not believed on a reasonable basis to be true and were made by the defendants with the intent to deceive and defraud the plaintiffs and to induce the plaintiffs to act and/or refrain from acting in reliance thereon.

FIFTEENTH: At the time that such representations were made and during the course of the period that the plaintiffs maintained their accounts with the defendants, plaintiffs did not know the truth or falsity of said representations made by the defendants, their agents, servants, employees and representatives, but reasonably believed and relied upon said representations as being true.

SIXTEENTH: As a result of and in reliance upon all of the foregoing rep-

resentations, plaintiffs were thereby induced to and did establish investment accounts with their own as well as trust monies with the defendants, which they continued to maintain with the defendant Brokers until plaintiffs discovered the false, fraudulent and deceitful nature of the representations as set forth herein as a result of all of which the defendants realized substantial sums of money in the form of fees and/or charges, the exact amounts of which are unknown at this time. At such time, plaintiffs' accounts were closed and discontinued and plaintiffs sustained losses of approximately $66,900.00.

SEVENTEENTH: Solely as a result of the actions of the defendants in mishandling and mismanagement of the accounts of the plaintiffs, the plaintiffs sustained a loss from their capital in the sum of approximately $66,900.00.

EIGHTEENTH: The plaintiffs would not have established or maintained the accounts with the defendants as aforedescribed had they known the representations made by the defendant Zinn, on behalf of himself and the defendant Brokers were false and fraudulent.

NINETEENTH: By reason of all of the foregoing, plaintiffs have been damaged in the sum of $66,900.00 and such other sums as defendants and their employees may have made, for which plaintiffs seek an accounting.

SECOND COUNT

TWENTIETH: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint numbered "FIRST" through "ELEVENTH" inclusive, with the same force and effect as though fully set forth at length herein.

TWENTY-FIRST: Heretofore and on and about and subsequent to the 18th day of March, 1976 and to the commencement of this action, plaintiffs maintained securities accounts with certain of the defendants in which they invested the total sum of $72,800.00.

TWENTY-SECOND: The plaintiffs established the aforesaid securities accounts solely based upon the promises made to plaintiff, Richard Brew, by the defendant Zinn in the course of his employment with the defendant Brokers, as more fully set forth in paragraph "TWELFTH" herein including, without limitation, that the accounts would be personally managed in a professional and expert manner, with the stated objectives of the plaintiffs of investing their monies and the trust monies in conservative income producing securities with appreciation of capital, and that plain-

tiffs' accounts would be expertly supervised by investment specialists and other persons fully familiar with the securities markets and plaintiffs' investment objectives in the employ of the defendants.

TWENTY-THIRD: Upon information and belief, the plaintiffs' accounts with the defendants were managed by defendant Brokers through their customer representative, Jerome Zinn, who totally disregarded plaintiffs' stated objectives as well as basic investment fundamentals of the securities industry by actively trading stocks, options and other securities not proper or appropriate for fiduciary or conservative accounts.

TWENTY-FOURTH: In managing the plaintiffs' accounts, the defendant Brokers were negligent, reckless and careless in that they:

a. permitted defendant Zinn to manage plaintiffs' accounts which required expert knowledge and experience, which the defendant Brokers were aware of and which the defendant Brokers disregarded;

b. permitted defendant Zinn, who either disregarded or was unfamiliar with and lacking knowledge in areas of investments for fiduciary income and conservative objectives, to manage plaintiffs' accounts;

c. instituted and maintained in the plaintiffs' accounts unusually large, grossly overextended positions in the various securities and options purchased for plaintffs' accounts by them, which defendant Zinn did without consulting the plaintiffs; permitted the establishment and maintenance of unusually large positions, involving major and unnecessary risks;

d. failed to utilize basic and

accepted loss-limiting procedures during the periods when the funds in the plaintiffs' accounts were fully committed which technical loss-limiting procedures would have been employed by an ordinarily prudent account executive in the course of the management of the plaintiffs' accounts;

e. failed to adopt a scientific and comprehensive investment plan with respect to the plaintiffs' accounts.

f. imprudently, negligently and carelessly engaged in indiscriminate buying, selling and trading of securities and options which were inconsistent with market conditions and defendant Brokers' recommendations at that time;

g. in that the individual defendant Zinn, who was placed, and who remained, in charge of management and supervision of the plaintiffs' accounts, failed to seek the supervision, guidance

and advice of investment and fiduciary account specialists, experts or others or in obtaining information independently;

h. failed to consult or communicate with the plaintiffs as to the quality of their investments, positions, decisions and events affecting their accounts;

i. failed to communicate with and keep the plaintiffs currently, continuously and momentarily advised with information of any events affecting their investments as they occurred;

j. did not have their most competent and expert investment and fiduciary account advisory and specialists managing plaintiffs' accounts even though defendant Brokers had been specifically requested to do so by the plaintiffs, and which the defendant Zinn had represented to plaintiff Richard Brew, prior to his establishing the accounts,

would be managed and supervised by a seasoned and expert investment and fiduciary account specialist;

k. on the occasions when the defendant furnished reports on the areas in which the plaintiffs' accounts were concerned or involved, the aforesaid reports were inaccurate and misleading, in many respects, were not based upon truth and factual data, but were motivated solely for the purpose of generating commissions extending into several thousands of dollars, which was solely for the benefit of the defendants;

l. did not have the best facilities for fiduciary or conservative investors utilized in that persons employed by defendant Brokers were totally lacking in their method of training and, further, that much, if not all, of their information was not of a first-hand basis, and not obtained by verification of in-

formation other than from secondary or tertiary sources;

m. did not furnish the plaintiffs with information or provide any of defendants' facilities to the plaintiffs in order to enable the plaintiffs to make intelligent decisions with respect to their investments, and did not provide any research facilities, staff or confidential reports;

TWENTY-FIFTH: Upon information and belief, the plaintiffs after establishing accounts with the defendants, actually did lose great sums of money based upon negligent, careless, reckless, wrong and improper information which was not in the best interests of the plaintiffs and which wrongful and improper information was utilized while the defendants were in a position of conflict of interest trading the same or similar securities for their own or others' accounts.

TWENTY-SIXTH: At the time that such representations were made and during the course of the period that the plaintiffs maintained accounts with the defendants, plaintiffs did not know the negligent, careless, reckless or false nature of said representations made by the defendant Zinn, but believed and relied upon said representations as being true and accurate and were thereby induced to establish accounts of approximately $72,800.00 with the defendants, which plaintiffs continued to maintain with the defendants until such time as they actually discovered the negligent, careless, reckless and false nature of the representations, statements and information as set forth herein.

TWENTY-SEVENTH: Solely as a result of the actions of the defendants, the plaintiffs sustained a loss of approximately $66,900.00.

TWENTY-EIGHTH: The plaintiffs would not have established and maintained the accounts with the defendants except for the expectations that their accounts would be managed and supervised in an expert manner by the defendants, and that the accounts would be expertly supervised by fiduciary and investment account specialists and other persons on the employ of the defendants.

TWENTY-NINTH: No part of the plaintiffs' losses would have occurred if the accounts had been managed and/or supervised in a professionally expert manner as herein alleged.

THIRTIETH: Solely as a result of the negligence of the defendants as hereinabove described, plaintiffs have sustained damages as hereinafter alleged and without any negligence on the part of the plaintiffs contributing thereto.

THIRTY-FIRST: By reason of all of the foregoing, plaintiffs have been damaged in the sum of $102,700.00.

THIRD COUNT

THIRTY-SECOND: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint numbered "FIRST" through "ELEVENTH", inclusive, and "TWENTY-FIRST" through TWENTY-EIGHTH", inclusive, with the same force and effect as though fully set forth at length herein.

THIRTY-THIRD: Defendants would have discovered the improper management by their registered representative, Zinn, of the plaintiffs' account had they properly supervised him and plaintiffs' losses could or would have been avoided had it not been for the negligence of the defendants in failing to properly supervise and manage the accounts of the plaintiffs.

THIRTY-FOURTH: By reason of the foregoing, plaintiffs have been damaged in the sum of $102,700.00.

FOURTH COUNT

THIRTY-FIFTH: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint numbered "FIRST" through "TWELFTH", inclusive, with the same force and effect as though fully set forth at length herein.

THIRTY-SIXTH: Prior to and at the time of the establishing of the accounts on behalf of the plaintiffs with the defendants, plaintiff, Richard Brew had stated to the defendants that he was interested in establishing investment and fiduciary accounts and wanted absolute assurance that the accounts would be managed and supervised by specialists who were experts in their respective fields; that he wished to have their

opinions, counsel, advice and recommendations, both in person, as may be contained in their reports from time to time, and by telephone that he wished to be a recipient of the benefit of the defendants' research facilities, that he wished to continuously and constantly be kept advised of all developments and information affecting his investments, and wished to have the use of the full extent of the services that would be provided by the defendants to its customers in the normal course.

THIRTY-SEVENTH: Defendants failed to inform the plaintiffs of the amounts of extraordinarily large commissions which would be realized by the defendants upon purchases and sales of securities and options for the plaintiffs' accounts.

THIRTY-EIGHTH: In order to maximize defendants' commissions and without regard

to the stated investment objectives of the plaintiffs, as well as the plaintiffs' explicit and specific instructions with respect to said investments, defendants indiscriminately purchased, sold and traded securities and options and thereafter switched investments from one security to another in order to maximize defendants' commissions, commonly known in the industry as "churning"

THIRTY-NINTH: Defendants caused the plaintiffs to enter into such repeated transactions of purchases and sales by making the representations as set forth in paragraph "TWELFTH" herein, and by failing to communicate with or direct plaintiffs' attention to the amount of commissions which the defendants would earn on such repeated transactions.

FORTIETH: Plaintiffs did not know the amount of commissions on the various purchases and sales of such securities

and options and, solely in reliance upon the representations and advice and at the urging and inducement of the defendants through their representative, defendant Zinn, the plaintiffs permitted the defendants to purchase and sell securities and options contracts as is reflected on the monthly statements of said accounts.

FORTY-FIRST: The transactions in the accounts of the plaintiffs were excessive in size and frequency in view of the financial resources and character of plaintiffs' accounts and the plaintiffs' stated investment objectives.

FORTY-SECOND: By virtue of the foregoing representations, concealments and course of conduct by the defendants, which were by use of means and instrumentalities in interstate commerce, and of the mails and facilities of national securities exchanges, the defendants employed a device, scheme and artifice

to defraud the plaintiffs, failed to communicate with plaintiffs or give statements of material facts necessary in order to have intelligent investments appropriate for the plaintiffs and their stated objectives made, and in engaging in actions, practices and courses of business which operated as a fraud and deceit upon plaintiffs in connection with the purchases and sales of securities and options contracts, all in violation of the Securities Act of 1933, the Securities and Exchange Act of 1934, as amended, and the rules and regulations of the National Association of Securities Dealers and the laws of the United States and the State of New York.

FORTY-THIRD: By virtue of all of the foregoing, plaintiffs were damaged in the sum of approximately $102,700.00, representing loss in capital, of which approximately $30,000.00 is represented

by commissions paid by the plaintiffs to the defendants as a result of the transactions within the accounts of the plaintiffs.

FIFTH COUNT

FORTY-FOURTH: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint numbered "FIRST" through "TWELFTH", inclusive, with the same force and effect as though fully set forth at length herein.

FORTY-FIFTH: By virtue of the representations and concealments by the defendants of their true purpose on behalf of plaintiffs in switching their investments among the various securities and options contracts with the result of maximizing the defendants' commissions, the same constituted a fraud and deceit upon the plaintiffs, which the plaintiffs would not have permitted had they known the true purposes of the defendants' intentions.

FORTY-SIXTH: Plaintiffs permitted the defendants to act as such in reliance upon the representations, actions and advice of the defendants, and believed them to be true, and without the knowledge of the true facts and intentions which were concealed by the defendants, and would not have so acted had they known the true facts with respect to the allegations contained herein.

FORTY-SEVENTH: By virtue of all of the foregoing, plaintiffs were damaged in the sum of $102,700.00 representing loss in capital, of which approximately $30,000.00 is represented by commissions paid by the plaintiffs to the defendants as a result of the transactions reflected in the plaintiffs' accounts.

SIXTH COUNT

FORTY-EIGHTH: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint

numbered "FIRST" through "TWELFTH", inclusive, with the same force and effect as though fully set forth at length herein.

FORTY-NINTH: By virtue of the establishment and maintenance of the accounts by the plaintiffs with the defendants, there arose a fiduciary and confidential relationship between the plaintiffs and the defendants with respect to the nature, type, quality and frequency of investments by the plaintiffs.

FIFTIETH: During the period that the plaintiffs maintained their accounts with the defendants, and the period of the existence of a fiduciary and confidential relationship, the defendants acted in express and direct violation of said fiduciary and confidential relationship in that they made false and fraudulent representations as set forth

more fully in paragraph "TWELFTH" which is incorporated by reference herein all of which caused the damages to the plaintiffs as hereinafter alleged.

FIFTY-FIRST: In addition to all of the false, fraudulent and misleading representations made as set forth herein, the defendants, either willfully or otherwise, failed to disclose that the defendants were acting for their own account or for other customers in entering into the transactions for the plaintiffs as reflected in their accounts.

FIFTY-SECOND: By virtue of all of the foregoing, plaintiffs were damaged in the sum of $102,700.00.

SEVENTH COUNT

FIFTY-THIRD: Plaintiffs repeat and reallege each and every allegation contained in paragraphs of the complaint "FIRST" through "FIFTY-SECOND", inclusive, with the same force and effect as

though fully set forth at length herein.

FIFTY-FOURTH: By reason of the false and fraudulent statements, as well as the negligent and other actions of the defendants as set forth herein, plaintiffs have suffered great mental anxiety severe nervous strain, requiring medical care and attention, impairing plaintiffs' health by the aggravation and mortification incident to the tremendous monetary losses sustained thereby, and by reason of the actions of the defendants, plaintiffs have been injured in their good names, reputations and characters.

FIFTY-FIFTH: By reason of all of the foregoing, plaintiffs have been prevented from attending to their usual affairs and have been subjected to great expenses and have incurred obligations and have sustained injuries of a permanent nature, all to their damage in the sum of One Million ($1,000,000.00) Dollars.

WHEREFORE, plaintiffs demand judgment as follows:

1. On the First Cause of Action:

a. that the defendants be compelled to account for all of the profits which plaintiffs lost as a result of defendants' action;

b. that the plainitffs be reinstated to the position that they would have been in but for the losses actually sustained, and profits they lost, all in the sum of $66,900.00, together with interest according to law.

2. On the Second through the Fifth Causes of Action, for a money judgment for compensatory damages in the sum of $102,700.00, together with interest according to law;

3. On the Sixth Cause of Action, in the sum of One Hundred Two Thousand, Seven Hundred ($102,700.00) Dollars, together with interest according to law.

4. On the Seventh Cause of Action in the sum of One Million ($1,000,000.00) Dollars.

5. For exemplary damages in the sum of One Million ($1,000,000.00) Dollars, together with the costs and disbursements of this action.

DWECK & SLADKUS, ESQS.
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666 Fifth Avenue
New York, New York 10103
(212) 246-6666

By: _____
Jack S. Dweck
A Member of the Firm

APPENDIX E

STATUTES

Federal Rules of Civil Procedure

RULE 8(a) CLAIMS FOR RELIEF

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

RULE 9(b) FRAUD, MISTAKE, CONDITION OF THE MIND

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

RULE 9(f) TIME AND PLACE

For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

RULE 11 SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when other-

wise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

RULE 15 AMENDED AND SUPPLEMENTARY PLEADINGS

(a) AMENDMENTS. A party may amend his pleadings once as a matter of course at any time before a responsive pleadings is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Opposition

1

Office-Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-418

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

RICHARD BREW and FRANCES M. BREW, as Trustees of the 156 East Cafe Profit Sharing Trust,

Petitioners,

v.

PHILIPS, APPEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB RHOADES, HORNBLOWER & CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FIRST WALL STREET SETTLEMENT CORPORATION AND LOEB RHOADES, HORNBLOWER & CO. IN OPPOSITION

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Other Authority

Rule 9(b), Federal Rules of Civil Procedure ..... *passim*

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BRIEF FOR FIRST WALL STREET SETTLEMENT CORPORATION AND LOEB RHOADES, HORNBLOWER & CO. IN OPPOSITION

Opinions Below

The opinion of the court of appeals (Pet. App. 1a) is unreported. The opinions of the district court dismissing the complaint (Pet. App. 5a) and the amended complaint (Pet. App. 17a) are also unreported.

Jurisdiction

The judgment of the court of appeals was entered on June 1, 1981. The petition for a writ of certiorari was filed on August 28, 1981. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the court of appeals erred in holding that the district court did not abuse its discretion in dismissing an amended complaint, with prejudice, for failure to plead fraud with particularity where the original complaint had been dismissed on precisely the same grounds.

Statement

The complaint in this action charged that the five defendants, four securities brokerage firms and defendant Jerome Zinn,[1] an individual registered representative, had violated certain unspecified provisions of the federal securities laws, and, through the same allegedly fraudulent conduct, had engaged in common law fraud.

By order dated November 12, 1980, the district court dismissed the complaint on the grounds that it did not plead fraud "with particularity", as required by Rule 9(b) of the Federal Rules of Civil Procedure ("FRCP"). Specifically, the district court concluded:

> First, the complaint does not indicate the time, place or contents of the false representations. Second, plaintiffs have not identified the parties making the representations or failing to disclose material information. Likewise it is impossible to glean from the

---

[1] Defendant Zinn was not served in this action (Pet. App. 21a n.3).

> complaint which defendant was responsible for which act, or what benefit anyone derived from the transactions. Finally, plaintiffs have not established any relationship among the five defendants.

(Pet. App. 13a-14a).

The district court granted plaintiffs leave to serve an amended pleading, which was served on December 12, 1980.

Plaintiffs' amended complaint was virtually identical to the original, with only slight modifications that did not enhance its particularity. Like the complaint, the amended complaint lumped all of the broker defendants together, without specifying which defendant was responsible for which act. Instead, the amended complaint alleged that defendant Zinn made various representations over a three to four year period and that these representations were made on his own behalf "and/or" on behalf of none, one or more of the other defendants. Accordingly, defendants moved to dismiss the amended complaint on the ground that it failed to plead fraud with particularity.

In its opinion granting the motion, the district court noted that the deficiencies of the original complaint had been set forth in the court's earlier opinion. The court went on to state that "[t]he amended complaint does little to rectify the short-comings of the original. . . ." (Pet. App. 20a). Among other things, the district court concluded that the amended complaint's "undifferentiated, general allegations against the collective defendants do not give adequate notice of the charges against each or any of them." (*Id.*) Accordingly, the amended complaint was dismissed with prejudice.

Petitioners appealed to the court of appeals for the second circuit, which affirmed for substantially the reasons set forth in the district court's opinions (Pet. App. 1a).

Argument

The decision of the court of appeals is correct and does not conflict with any decision of this court or any other court.

1. Rule 9(b), FRCP, an exception to the normal notice pleading requirement, is intended to prevent the use of fraud counts as a pretext for discovery, to protect the reputations of individuals whose good names are dishonored by fraud claims and to give defendants sufficient notice of their alleged wrongs to enable them to frame a defense. *Segal* v. *Gordon*, 467 F.2d 602, 607-608 (2d Cir. 1972).

The application of Rule 9(b) by the courts below is not novel. It is consistent with the guiding principles enunciated often in the Second Circuit and other lower courts. *E.g.*, *Ross* v. *A.H. Robins Co., Inc.*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980); *Denny* v. *Barber*, 576 F.2d 465 (2d Cir. 1978); *Polera* v. *Altorfer, Podesta, Woolard and Co.*, 503 F. Supp. 116 (N.D. Ill. 1980); *McFarland* v. *Memorex Corp.*, 493 F. Supp. 631 (N.D. Cal. 1980); *Stromfeld* v. *Great Atlantic & Pacific Tea Co., Inc.*, 484 F. Supp. 1264 (S.D.N.Y. 1980); *In re Commonwealth Oil/Tesoro Petroleum Corporation Securities Litigation*, 467 F. Supp. 227 (W.D. Tex. 1979); *Lincoln National Bank* v. *Lampe*, 414 F. Supp. 1270 (N.D. Ill. 1976).

Neither the complaint nor the amended complaint identified which defendant was responsible for which allegedly fraudulent acts. The complaint and amended complaint further failed to identify any relationships among the broker-defendants making each or any of them liable for the acts of the registered representative, Jerome Zinn. Finally, the complaint and amended complaint failed to specify the time, place or, indeed, in some instances, the substance of the alleged fraudulent acts and representa-

tions. Thus, although petitioners claim to allege "churning" violations, they have failed to specify a single security or trade that they made with any defendant. *See Polera* v. *Altorfer, Podesta, Woolard and Co., supra,* 503 F. Supp. at 118.

Petitioners cite no authority which supports the conclusion that a complaint with such failings must stand.

2. Petitioners' real quarrel is not with the court of appeals' interpretation of Rule 9(b), but with the denial of further leave to amend. As this court has stated, however, "[i]t is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 330 (1971). Here, the court of appeals underscored the appropriateness of the district court's exercise of discretion:

> [n]o party has a right to multiple opportunities to amend before a complaint will be dismissed. *Denny, supra,* 576 F.2d at 471. Where, as here, appellants were given adequate opportunity to amend along the lines suggested, and to correct the deficiencies indicated in the District Court's first opinion, and failed to do so, dismissal of the complaint was a proper exercise of discretion.

(Pet. App. 3a-4a)

Petitioners would have this court grant them multiple chances to amend so that they can take "extensive discovery." (Petition at 27). But complaints are not devices to be used to discover a cause of action. To the contrary, this court has emphasized that:

> to the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settle-

> ment value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975).

Conclusion

For the foregoing reasons, it is respectfully suggested that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Statement Pursuant to Rule 28.1.

Loeb Rhoades, Hornblower & Co., now known as Loeb Partners, is a partnership consisting of Loeb Partners Corporation (formerly Loeb Rhoades & Co., Inc.) and HWN&T, Inc. (formerly Hornblower, Weeks, Noyes & Trask, Incorporated). Loeb Partners Corporation is owned by Loeb Rhoades Group, Inc. and C.V. Star & Co., Inc.

The following are subsidiaries of Loeb Partners and its subsidiaries (wholly owned subsidiaries that may be in contact with the investing public are included):

First Wall Street Settlement Corporation (wholly owned)

Loeb Partners Realty

L R Management, Inc.

Loeb Rhoades, Hornblower Securities Corporation (wholly owned)

Loeb Capital Corp.

LPR Rafter Mall, Inc.

Loeb Partners Realty Southeast, Inc.

Opposition

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81-418

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IN THE

Supreme Court of the United States

October Term, 1981

RICHARD BREW and FRANCES M. BREW as Trustees of the 156 East Cafe Profit Sharing Trust,

Petitioners,

v.

FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHOADES, HORNBLOWER & CO., AND PHILIPS, APPEL & WALDEN, INC., HAMILTON/COOKE SECURITIES CORP. and JEROME ZINN,

Defendents,

PHILIPS, APPEL & WALDEN, INC., FIRST WALL STREET SETTLEMENT CORPORATION, LOEB, RHOADES, HORNBLOWER & CO.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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ROBERT BRANTL

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Questions Presented

1. Did the District Court act within its discretion in dismissing the amended complaint pursuant to Rule 9(b) of the Federal Rules of Civil Procedure where such complaint charged multiple defendants with fraud, but failed, inter alia, to indicate the time, place, or contents of the alleged fraud, which defendant was responsible for which alleged wrong, or what relationship existed among the defendants?

2. Did the District Court act within its discretion in dismissing with prejudice the amended complaint, having specified the deficiencies in the original complaint, and having offered plaintiffs' counsel full opportunity to

argue the sufficiency of the amended complaint or to state additional facts which would justify leave to plead for a third time?

Statement of the Case

The original complaint charged four institutions and one individual broker with acts of fraud in connection with the establishment of plaintiffs' brokerage accounts, in violation of "the Securities Acts of 1933 and 1934, as amended." (APP. 31a)[1] The complaint also alleged that each of the four institutions was liable for failure to adequately supervise the defendant broker.

---

1 References to the Appendices to the Petition for Writ of Certiorari are designated "APP" followed by the appropriate page number.

The broker and one of the institutions were never served with process. The other three defendants jointly moved to dismiss the complaint for failure to plead fraud with particularity.

On November 12, 1980, Judge Lowe dismissed the complaint with leave to file an amended complaint. In her memorandum (APP. 13a-14a), Judge Lowe described seven specific deficiences of the complaint:

> Plaintiffs have not complied with Rule 9(b). First, the complaint does not indicate the time, place or contents of the false representations. Second, plaintiffs have not identified the parties making the representations or failing to disclose material information. Likewise, it is impossible to glean from the complaint which

> defendant was responsible for which act, or what benefit anyone derived from the transactions. Finally, plaintiffs have not established any relationship among the five defendants. As a result, the defendants cannot sort our or respond to the many charges contained in the pleadings.

On December 12, 1980, plaintiffs filed their amended complaint. Disregarding the explicit directive of Judge Lowe, plaintiffs corrected none of the defects found in the original complaint. Again the three defendants who had been served move to dismiss the amended complaint for failure to plead fraud with particularity.

Following the procedure approved by the Second Circuit in Denny v. Barber, 576 F.2d 465, 468 (2d Cir. 1978), Judge Lowe met with counsel for

all parties and afforded plaintiffs' counsel a full opportunity to convince her that the amended complaint met the standards for pleading fraud in federal court, or that plaintiffs had sufficient facts to satisfy these standards if leave were given to plead a third time. Plaintiffs' counsel was unable to do so. In her decision dated January 30, 1981, Judge Lowe dismissed with prejudice the amended complaint for failure to plead fraud with particularity, stating (APP 20a-22a):

> The amended complaint does little to rectify the short-comings of the original and does not afford the defendants "a reasonable opportunity to answer the complaint" nor give "adequate information to frame a response." [Ross v. A.H. Robins Co., 607 F.2d 545, 557-558 (2d. Cir. 1979) cert. denied 446 U.S. 946 (1980)] Paragraph 12 of the amended complaint alleges that "in or about 1976, 1977, 1978 and 1979, in the County, City and

> State of New York, the defendant Zinn, on behalf of himself and the co-defendants" made allegedly false representations to the plaintiffs. In describing the complicity of the defendants and their respective roles in the alleged fraud, plaintiffs merely claim in paragraph 6 that defendant Zinn "was acting both individually and/or was employed and/or was otherwise engaged and acting for and/or on behalf of the defendants ... at discrete times, the exact dates not being known at this time".
>
> These undifferentiated, general allegations against the collective defendants do not give adequate notice of the charges against each or any of them. Dismissal of the amended complaint is therefore warranted.

On appeal to the United States Court of Appeals, Judge Lowe's decision to dismiss the amended complaint with prejudice was affirmed. The Court held (APP. 3a-4a):

> No party has a right to multiple opportunities to

> amend before a complaint will be dismissed. [Denny v. Barber, 576 F.2d 465, 471 (2d Cir. 1978)]. Where, as here, appellants were given adequate opportunity to amend along the lines suggested, and to correct the deficiencies indicated, in the district Court's first opinion, and failed to do so, dismissal of the complaint was a proper exercise of discretion.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari (hereinafter the "Petition") states no "special and important reasons" for granting of the writ, and there are none. The Petition states no decision of another court of appeals with which the decision below is in conflict; nor does the Petition state that any important question of federal law has been decided without basis in the decisions of this Court. Rather the Petition is a

simple plea that this Court excuse petitioners from compliance with the Federal Rules of Civil Procedure in order that they may go forth with an action that bears all the classic characteristics of a strike suit.

The kernel of petitioners' argument is that they should be permitted to make allegations of acts of fraud against several defendants without particularizing the circumstances of the fraud or the culpability of the defendants, then to conduct full discovery "as a supplement for any claimed deficiencies in identification of time, place or individuals involved in the fraud." (Petition 38). In effect, petitioners ask the Court to legitimize the very use of discovery which was decried by the

Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975), by which:

> "(T)he prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents ... permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence ..."

There is a suggestions in the petition that the pleading requirements of Rule 9(b) should be relaxed in the case because petitioners are suing as trustees of their pension trust. (Petition 15-16). No reasoning is offered to support the proposition, and there is no

reason such an exception should be drawn. The authorities offered by petitioners for this proposition were addressed to pleading of fraud committed against a non-party, the facts of the fraud being outside the personal knowledge of the plaintiff. In contrast, petitioners here allege in their amended complaint that they themselves opened the brokerage accounts "for themselves individually as well as for the Trust," and that the fraudulent representations of which they complaint were made to them personally. (APP. 32a). Under those circumstances, there is no reason that petitioners should not be required to state the circumstances surrounding the alleged fraud.

Petitioners can find no support in the Courts of Appeals for their argument that they be permitted to go forth with this action. The five cases which petitioners cite from Courts of Appeals other than the Second Circuit include three in which the courts expressly found that the complaint adequately alleged the time and place of the fraud and the culpability of each defendant. (Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975); Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973); Brady v. Games, 128 F.2d 754 (D.C. Cir. 1942)) and two in which the complaints were dismissed without leave to replead (Lee v. Alabama, 364 F.2d 945 (5th Cir. 1966); (Duane v. Altenburg, 297 F.2d 515 (7th Cir. 1962)). Petitioners

can direct the Court to no authority for the proposition they espouse: that plaintiffs who have proven themselves incapable of particularizing the fraud they allege are entitled nonetheless to go forth with their suit.

The parameters of the discretion to deny leave to amend were set forth in Foman v. Davis, 371 U.S. 178 (1962). Among the reasons justifying such denial are "repeated failure to cure deficiencies by amendments previously allowed... (and) futility of amendment..." 371 U.S. 178, 182. The opinions below make clear that petitioners herein were afforded the assistance of Judge Lowe and an adequate opportunity either to cure the deficiencies in their pleadings or to present evidence of their ability to do

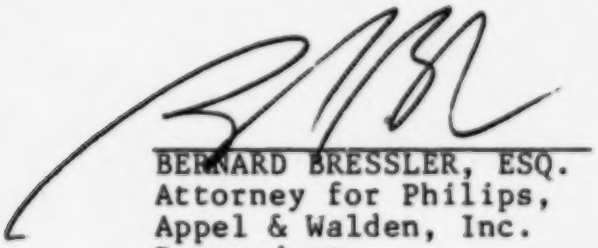
so by further amendment. When petitioners failed to satisfy Judge Lowe in either way that leave to amend was not inappropriate, she dismissed the amended complaint with prejudice. In doing so she acted fully within the limits of discretion defined by this Court. No reason is shown why the Court should now reconsider the breadth of that discretion.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Dated: September 25, 1981

Respecfully submitted,



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STATEMENT PURSUANT TO Rule 28.1

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